No. 3517

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALBERT YOUNG,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

REPLY BRIEF OF DEFENDANT IN ERROR.

FRANK M. SILVA,
United States Attorney.

WILFORD H. TULLY,
Asst. United States Attorney.

Attorneys for Defendant in Error.

Neal, Stratford & Kerr, S. F. —8858

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STATEMENT OF FACTS.

The plaintiff in error, hereinafter called the defendant, and his bartender, Walter Dekau, were convicted in the United States District Court for the Northern District of California of maintaining a public nuisance in violation of Section 3 of the National Prohibition Act.

The defendant contends (1) that the evidence was insufficient to justify a conviction; (2) that the information does not charge a crime against the laws

of the United States, and (3) that the court had no jurisdiction to try the defendant upon the information.

ARGUMENT.

I.

The evidence is sufficient to sustain the conviction of the defendant.

The information charges the defendant as follows:

> "NOW, THEREFORE, your informant present: THAT W. DEKAU and ALBERT YOUNG, hereinafter called the defendants, heretofore to-wit, on the twentieth day of November, in the year of our Lord one thousand nine hundred and nineteen, at San Francisco, in the Southern Division of the Northern District of California, then and there being, did then and there, in violation of Section 3 of the Act of October 28th, 1919, known as the 'National Prohibition Act,' unlawfully, wilfully and knowingly maintain a public and common nuisance in that they did unlawfully, wilfully and knowingly sell and keep for sale for beverage purposes on the premises at number 2965 Sixteenth Street in San Francisco aforesaid, certain intoxicating liquor, to-wit, whiskey.
>
> AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided."

The information shows that the defendant and Dekau were charged jointly with maintaining a pub-

lic nuisance. The record shows that the proprietor of the saloon was the defendant Young, and that he employed Dekau as a bartender.

Trans., page 24:

> "Q. You are the proprietor of the premises referred to in this case. A. Yes, sir.
>
> Q. Do you recognize this bottle which has been offered in evidence here?
>
> A. We used to have wine bottles like that around."

Trans., page 17:

> "Q. Who conducts this place? A. Albert Young.
>
> MR. MORRIS: There is no question about that, Mr. Young conducts the place."

Trans., page 18:

> "Q. On or about November 20, were you employed by Mr. Young as a bartender in the saloon at Mission and 16th Street? A. Yes, sir."

The record also shows that intoxicating liquor was sold by the bartender Dekau at the premises and that the consideration involved in the transaction went to the benefit of the defendant Young.

Trans., page 11:

> "As I came up to the bar I saw a man drinking a drink and the bartender came up to the cash register with the cash in his hand, and rang up twenty-five cents; Deputy Collector Doyle

took this glass away from the bartender and we both smelled of the glass, and it smelled of whiskey."

Trans., pages 15-16:

"I went in and there was a man drinking whiskey; he came to the bartender, Mr. Dekau, at that time he could not get into the little room, because the door was locked; it was a Yale lock, and he came around, he was behind the bar; Mr. Dekau went to the cash register and he rang up 25c; I took the glass and smelled of it. There was two parties standing outside of the bar, one by the name of McKey and another fellow that happened to work down at the Motor Taxi Company.

Q. Did you see the liquor served?

A. I saw the liquor served.

Q. From the bottle? A. From the bottle.

Q. You saw the 25c passed over the bar?

A. Yes, sir."

The record thus shows that the defendant not only maintained the place which constituted the nuisance, but employed the man who sold the liquor, and received the profit arising out of maintaining the nuisance. To permit a proprietor to escape under such circumstances would render the Act nugatory as to the person who ought to be punished. The court in the case of Carroll v. State, 3 Atl. 29 (Md.) very aptly said:

"If the principal makes such sale at his peril, and is not excusable because he did not know or was deceived, for the reason that he was bound to know, and, if he was not certain, should decline to sell or take the hazard, it cannot be that, by setting another to do his work, and occupying himself elsewhere and otherwise, he can reap the benefit of his agent's sales, and escape the consequences of the agent's conduct. It would be impossible to effectually enforce a statute of this kind if that were allowed, and no license would ever be suppressed."

Where the evidence shows that the unlawful sale of liquor was made in the defendant's shop or place of business by his agent, that fact alone raises a presumption that the defendant authorized, or knew of it and consented to it.

Black on Intoxicating Liquor, section 371.

Commonwealth v. Perry, 148 Mass. 160—19 N. E. 212:

"Knowlton, J. In each of these three cases the only question is whether there was sufficient evidence to warrant a verdict of guilty. The testimony of the witness Dickerson was substantially the same in each. It tended to show a sale of pure alcohol, made by a clerk of the defendant, in the regular course of the defendant's business. That was sufficient to warrant a finding that the sale was authorized by the defendant. *Com.* v. *Locke,* 145 Mass. 401, 14 N. E. Rep. 621; *Com.* v. *Briant,* 142 Mass. 463, 8 N. E. Rep. 338; *Com.* v. *Holmes,* 119 Mass. 195."

Fullwood v. State, 7 So. 432 (Miss.)

"If appellant was the owner of the bar on the steamer Katie Robins, and intoxicating liquor was sold by a person apparently in charge thereof, as clerk or agent, the sale was, in the absence of any countervailing testimony, to be taken as a sale by the defendant; and, since there was no such countervailing evidence, the instruction given in behalf of the state was not error."

Also:

State v. Wentworth, 65 Me. 234.
Com. v. Nichols, 10 Metc. (Man.) 259.
Molihan v. State, 30 Ind. 266.

Where the defense is that the agent violated a direction or instruction requiring him not to make illegal sales, the question, whether or not such order was so given, is for the jury to determine.

State v. Wentworth, 65 Me. 234.
Com. v. Rooks, 150 Mass. 59—22 N. E. 436.

The jury in the case at bar has decided against the defendant upon his defense that the sale was unauthorized. The fact that the money paid for the liquor went into the cash register of the defendant would raise a conflict in the evidence so far as the testimony of the defendant and his bartender went concerning the instructions given.

II.

The information in the case at bar does state a crime against the laws of the United States.

Section 3 of Title I of the National Prohibition Act, under which the defendant was charged, provides:

> "Any room, house, building, boat, vehicle, structure or place of any kind where intoxicating liquor is sold, manufactured, kept for sale, or bartered in violation of the War Prohibition Act, and all intoxicating liquor and all property kept and used in maintaining such a place, is hereby declared to be a public and common nuisance, and any person who maintains or assists in maintaining such public and common nuisance shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than $100 nor more than $1,000, or be imprisoned for not less than thirty days or more than one year, or both. If a person has knowledge that his property is occupied or used in violation of the provisions of the War Prohibition Act and suffers the same to be so used, such property shall be subject to a lien for and may be sold to pay all fines and costs assessed against the occupant of such building or property for any violation of the War Prohibition Act occurring after the passage hereof, which said lien shall attach from the time of the filing of notice of the commencement of the suit in the office where the records of the transfer of real estate are kept; and any such lien may be established and enforced by legal action instituted for that pur-

pose in any court having jurisdiction. Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease."

The information charges the defendant as follows:

"NOW, THEREFORE, your informant presents: THAT W. DEKAU and ALBERT YOUNG, hereinafter called the defendants, heretofore to-wit, on the twentieth day of November, in the year of our Lord one thousand nine hundred and nineteen, at San Francisco, in the Southern Division of the Northern District of California, then and there being, did then and there, in violation of Section 3 of the Act of October 28th, 1919, known as the 'National Prohibition Act,' unlawfully, wilfully and knowingly maintain a public and common nuisance in that they did unlawfully, wilfully and knowingly sell and keep for sale for beverage purposes on the premises at number 2965 Sixteenth Street in San Francisco aforesaid, certain intoxicating liquor, to-wit, whiskey.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided."

An information which describes the offense in the words of the statute is sufficient.

Skinner v. State, 120 Ind. 127—22 N. E. 115.

"The general rule is that an indictment describing the offense in the language used by the statute in defining it is sufficient. State v. Bougher, 3 Blackf. 307; Pelts v. State, Id. 28;

Marble v. State, 13 Ind. 362; Malone v. State, 14 Ind. 219; Stuckmyer v. State, 29 Ind. 20; Shinn v. State, 68 Ind. 423; State v. Allisbach, 69 Ind. 50; Howard v. State, 87 Ind. 68; Toops v. State, 92 Ind. 13; State v. Miller, 98 Ind. 70; State v. Berdetta, 73 Ind. 185. Some of the exceptions are where the statute creating the offense charged contains language which embraces acts evidently not intended to be made criminal, and cases where it was the evident intention of the legislature that reference should be had to the common law for a complete definition of the offense declared by the statute. Schmidt v. State, 78 Ind. 41; Moore, Crim. Law, Sec. 171; Anderson v. State, 7 Ohio, 539; Mains v. Sta , supra. The case of Mains v. State falls within the latter exception. The statute under consideration does, in our opinion, create and fully define the offense for which the appellant was prosecuted. *It declares that whoever keeps a place where intoxicating liquors are sold, bartered, given away, or suffered to be drunk in a disorderly manner, to the annoyance or injury of any part of the citizens of this state, shall be fined,* etc. *In such case we think it sufficient, in charging the violation of such statute, to follow the language of the legislature in defining the offense.* We think the indictment above set out charges a public offense, and that the court did not err in overruling the motion in arrest of judgment."

Also:

State v. Welch, 7 Atl. 475 (Me.).
Com. v. Ferden, 141 Mass. 28, 6 N. E. 239.
Com. v. Ryan, 136 Mass. 436.

The information does not charge the defendant with "the selling of liquor," as intimated in defendant's brief, but it charges that he did "in violation of Section 3 of the Act of October 28, 1919, known as the National Prohibition Act, unlawfully, wilfully and knowingly maintain a public and common nuisance in that," etc.

Section 32 of the Act provides that it is not necessary to set out the details of the act complained of, but that it is sufficient to allege that the act complained of was prohibited and unlawful.

Section 32, National Prohibition Act follows:

> "It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so."

Where the statute and not the common law defines the character of the nuisance as in the case at bar, the repetition, or frequency, of illicit sales is not the test by which to determine the character of the place as a nuisance. The maintaining of a place where liquor is sold or kept for sale in violation of law is the act of the defendant creating the nuisance, and a single sale will warrant a conviction upon a charge for maintaining such a nuisance.

State v. Pierce, 65 Iowa 85, 21 N. W. 195.

"Counsel for defendant takes exception to this instruction. His position is that to render the place a nuisance, under the section quoted above, the drunkenness, etc., must be either carried on or permitted to be carried on there; that is, there must be a recurrence at the place of the acts enumerated in the section, or some of them, in order to make it a nuisance, and that it would not be given that character by a single transaction; but that, under the instructions, defendant might be convicted on proof that he permitted said acts to be done at his place on a single occasion. We think, however, that this position is not correct. The construction put upon the section by the district court gives to the language its natural and fair meaning. The people of a community may be greatly disturbed and annoyed by a single assemblage of drunken men in their midst, or by fighting and quarreling there, although it should occur but once. The object of the statute is to protect them from the disturbance and annoyance which would be occasioned by the occurrence of such events in their midst; and the evident intention of the legislature in enacting it was to provide for the punishment of men who should permit such acts to be done in buildings or places under their control to the disturbance of others."

State v. Reyelts, 74 Io. 499—38 N. W. 377.

"The district court rightly directed the jury that a single sale would warrant a conviction

for the nuisance. The keeping of intoxicating liquors, with the intent to sell them contrary to law, is the act of defendant creating the nuisance. One sale will disclose the unlawful intent as well as the keeping. Hence upon one unlawful sale a conviction may be had for nuisance. This we understand is the recognized rule in this state.

III.

The District Court had jurisdiction to try the information.

A violation of the National Prohibition Act is a misdemeanor, and it is well settled that misdemeanors may be prosecuted by information.

United States v. Thompson, 251 U. S. 414.
United States v. Wells, 225 Fed. 320.
Weeks v. United States, 216 Fed. 320.

The fifth amendment to the Constitution upon which the defendant attempts to base his argument is specifically limited in its terms to infamous crimes and not applicable to misdemeanors.

The National Prohibition Act itself contemplates that prosecutions will be instituted by informations.

Section 32 of Act of October 28, 1919:

"In any affidavit, *information*, or indictment for the violation of this Act, separate offenses may be united in separate counts and the de-

fendant may be tried on all at one trial and the penalty for all offenses may be imposed."

It is respectfully submitted that the judgment should be affirmed.

FRANK M. SILVA,
United States Attorney.

WILFORD H. TULLY,
Asst. United States Attorney.